The Commonwealth of Puerto Rico, with its own constitution, was born out of the Puerto Rican Federal Relations Act, 64 Stat. 319 (1950) (codified at 48 U.S.C. 731(b)).

The United Nations adopted Resolution 748, on November 21, 1953, recognizing the new status of Puerto Rico and, thus, eliminated the need for the United States to report on Puerto Rico as a non-self-governing territory on November 21, 1953.

No state, territory, or possession of the United States has such a unique legislative and legal history with the resultant status rendering any appellate judicial decision on the right to vote for President of the United States by citizens residing in Puerto Rico to the exclusive venue of the First Circuit Court of Appeals. There can be no conflict between the appellate circuits over voting in the Presidential election in Puerto Rico. Thus, the *en* banc 5-2 split of the First Circuit, now pending review by this Court, is the jurisdictional equivalent of a conflict between the federal appellate circuits.

II. THE NINTH AMENDMENT PROTECTS THE RIGHT TO VOTE FOR UNITED STATES CITIZENS LIVING IN PUERTO RICO, AND THE RIGHT TO RESIDE IN PUERTO RICO WITHOUT LOSS OF SUFFRAGE

A. The Ninth Amendment protects the unenumerated right to vote in Presidential elections

United States citizens residing in Puerto Rico are subject to, and enjoy the protection of, this Court as a fundamental right. The same citizens also enjoy other fundamental rights under the Constitution, even though they lack equality with all of the rights enjoyed by United States citizens residing in a state. A citizen's right to vote for President is a fundamental right protected by the Ninth Amendment, U.S. CONST., Amendment IX.

The Preamble of the United States Constitution opens with the phrase, "We the People," not "We the States". U.S. CONST., Preamble. Before the ratification of the first ten amendments, the Constitution did not speak of, or provide for, individual rights. The People are the source of fundamental rights.

The Article II provision for states to select Presidential Electors is procedural in nature and does not grant nor take fundamental citizen's rights. U.S. CONST., Art. II, Sec. 1, cl. 2. The body of individual rights found in the Constitution is in the first ten Amendments, known as the Bill of Rights. The Ninth Amendment guarantees individuals those fundamental rights inherent to citizenship in a democracy which are not enumerated in the Bill of Rights.

The most prominent reliance on Article II as a source of voting rights in Presidential elections is *Bush v. Gore*, 531 U.S. 98 (2004). However, *Bush v. Gore* did not address the Ninth Amendment unenumerated rights of the People.

This Court has acknowledged that certain rights which are not spelled out in the Constitution must be recognized in order to make the Constitution whole. In *Griswold v. Connecticut*, 381 U.S. 479 (1965), this Court recognized a personal right to privacy which was not articulated in the Constitution. If a right to privacy lies within the scope of fundamental rights protected by the Ninth Amendment than a preeminent right like voting for President of the United States is also afforded protection.

This Court clearly recognized the fundamental nature of the right to vote for President in *Anderson v. Celebrezze*, 460 U.S. 780 (1983). In *Anderson*, this Court said a Presidential election is, "a uniquely important national interest." Continuing, "For the President and Vice President of the United States are the only elected officials who represent all the voters in the Nation." *Id.* at 794.

Nearly a half-century before *Anderson*, this Court noted the fundamental importance of the Presidential election. "The President is vested with the executive power of the Nation. The importance of his election and the vital character of its relationship to and effect upon the welfare and safety of the whole people cannot be too strongly stated." *Burroughs v. United States*, 290 U.S. 534 (1934) at 545.

Voting for President of the United States is not done directly, but by Electors. The Electors are selected by states based on the popular vote for President by the People. The Article II provision for the selection of Electors in the states preceded Spain's ceding of Puerto Rico to the United States. The failure of Congress, either by legislation or the amendment procedure, to provide for the selection of Electors for the United States citizens residing in Puerto Rico does not negate the inherent Ninth Amendment right of citizens to vote. The Ninth Amendment right to vote for President is independent of Article II and would still be an unenumerated fundamental right even if Article II were stricken from the Constitution.

B. The Ninth Amendment protects the unenumerated right to reside in Puerto Rico without surrendering the right to vote

The Ninth Amendment protection of fundamental unenumerated rights protects not only those United States citizens residing in Puerto Rico from disenfranchisement but also extends to citizens residing in the states. All United States citizens may travel freely to and from the island of Puerto Rico to any of the states and citizens residing in Puerto Rico may freely move their residence to any state without loss of any fundamental right.

However, United States citizens residing in the states may not move their residence to Puerto Rico without loss of suffrage in the Presidential elections. Citizens that live in the states, unwilling to lose their Ninth Amendment fundamental right to vote for the

President, are now barred from moving to Puerto Rico by the misplaced application of Article II of the Constitution.

Just as the Ninth Amendment shields the People from disenfranchisement, it also protects the fundamental right to live under the protection of the United States without penalty of the loss of suffrage.

III. INTERNATIONAL TREATY CLAIMS AND OBLIGATIONS ARE NATIONAL IN SCOPE AND CONTROL OR INFLUENCE FOREIGN AFFAIRS

While lower courts are free to interpret treaty law, only review by this honorable Court is sufficient to provide the necessary finality.

In the instant case, the vacated *per curiam* order of the First Circuit three-judge panel majority closed with the observation: "Indeed, it seems apparent that a definitive constitutional ruling of the magnitude sought here can, in the final analysis, only emanate authoritatively from the Supreme Court itself." *Igartua de la Rosa v. United States*, 386 U.S. F.3d 313 (1st Cir. 2004) at 314.

In a monitory addressed to plaintiff Gregorio Igartua de la Rosa, the District Court in the case at hand offered *dicta* illustrating the frustrations of lower courts over "The Puerto Rican Dilemma":

> Indeed, other judges, district and appellate, in this and other Circuits have demonstrated concern over the anomaly presented because of the "peculiar structure" of the constitutional dictates relating to the election of the President resulting in U. S. citizens residing in Puerto Rico being unable to vote in a presidential election. [footnotes omitted]

Igartua de la Rosa v. United States, 331 F.Supp.2d 76 (D. Puerto

Rico 2004) at 80. The District Court monitory continues:

> "Equally acidulous are the noble pronouncements written into treaty obligations assumed by the United States such as the ICCPR [International Covenant on Civil and Political Rights] which employs the following aspiring language: "Every *citizen* shall have the right ..., to vote and be elected at genuine periodic elections which shall be by universal and equal suffrage and *[a]ll persons* are equal before the law." Obviously these noble utterances about the rights of *all* citizens before the law sits ill at ease with the notion that there is an exception to that right if one is a resident of Puerto Rico." [footnotes omitted] *Id.* at 80-81.

An appellate jurist from the Second Circuit has observed *ex curia* the problems the abridgment of the voting rights of U. S. citizens residing in Puerto Rico has presented to our nation's diplomatic corps to the United Nations: "In addition, this exclusion fuels annual attacks on the United States in hearings in the United Nations, at which the United States is decried as hypocritically preaching democracy to the world while practicing nineteenth-century colonialism at home." *Romeu v. Cohen*, 265, F.3d 118 at 127.

The appellate *en banc* majority opinion, for which review is sought, expressed its own concern about rendering a judicial decision which "could also embarrass the United States in the conduct of its foreign affairs...." *Igartua de la Rosa v. United States*, 407 F.3d 30 (1st Cir. 2005). The majority opinion then illustrates the limitations of lower court interpretation of treaty law:

> Whatever the State Department might later say, such a declaration by a federal court of a supposed "treaty obligation" could be trumpeted as propaganda in

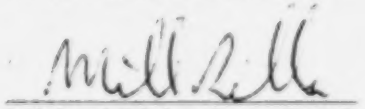
> international bodies and elsewhere. This is a legitimate concern in considering whether "discretion" should be exercised to grant declaratory relief. Of course, no such declaration would confer a presidential vote on Igartua: it would merely reinforce the disturbing view that judges have no proper notion of where their own authority ends." *Id.*

These statements demonstrate a misunderstanding of the role of the judiciary vis-vis treaties and international law. The review of treaty law, as an integral part of the law of the land, is a non-delegable judicial duty. Indeed, the federal courts are the final interpreters of treaties. In this case, with fundamental voting rights at issue, the attention of the Supreme Court is needed.

CONCLUSION

For the above stated reasons, the Petition for Writ of Certiorari should be granted and the decision below should be reviewed on its merits.

Respectfully submitted,



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Dated this 23rd day of January 2006